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October 12, 2004

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OCT 12 2004

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Federal Communications Commission  
Office of Secretary

Re: ***Unbundling Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338***

Dear Ms. Dortch:

SBC Communications Inc. (SBC) opposes XO Communications, Inc.'s (XO's) request that the Commission immediately "reaffirm" that CLECs are impaired on a nationwide basis if they are denied unbundled access to DS1 loops.<sup>1</sup> Any such action patently would be unlawful. The D.C. Circuit vacated the Commission's previous impairment findings with respect to high capacity facilities, including high capacity loops, on the ground that nationwide unbundling could not be justified on the record assembled before the Commission.<sup>2</sup> The Commission cannot

<sup>1</sup> XO Communications, Inc., Emergency Petition for Expedited Determination That Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops (filed Sept. 29, 2004) (*Emergency Petition*).

<sup>2</sup> *USTA v. FCC*, 359 F.3d 554, 574 (D.C. Cir. 2004) (*USTA II*), petitions for cert. denied October 12, 2004, *NARUC v. USTA*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004) ("as with mass market switching, the Order itself suggests that the Commission doubts a national impairment finding is justified on this record"). XO asserts that the D.C. Circuit did not vacate the Commission's rules requiring nationwide unbundling of high-capacity loops. *Emergency Petition* at 16-19. However, the court made clear that it vacated all of the Commission's delegations of impairment determinations to the states. *USTA II* at 568. And, notwithstanding XO's claims to the contrary (*id.* at 19-21), the Commission made such a delegation with respect to high capacity loops – including DS1s. *Triennial Review Order* at paras. 327-28. In addition, the court made clear that it used the term "transport" to refer to all transmission facilities, including (specifically) "transmission facilities dedicated to a single customer," which the Commission defines as "loops." *USTA II* at 573. The court's treatment of high capacity loops and transport reflected the way in which SBC and other ILECs briefed the issue by addressing both together. See Brief for ILEC Petitioners and Supporting Intervenor at 31-35, Nos. 00-1012, *et al.* (D.C. Cir. Filed Jan. 16, 2004). Moreover, the substantive flaws with respect to the Commission's impairment analysis that the D.C. Circuit identified – considering impairment on a route-specific basis and failure to consider the availability of special access – apply equally to loops and transport. See *USTA II* at 575.

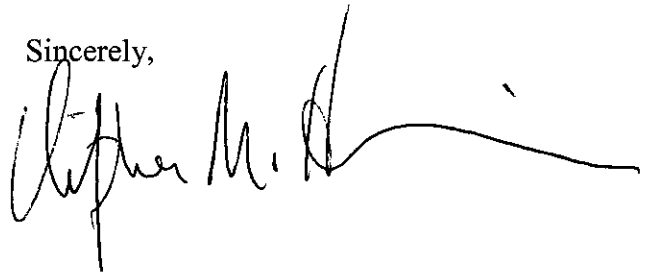
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simply “reaffirm” its prior provisional impairment findings in the teeth of this finding. Nor can the Commission “make a fresh DS1 nationwide impairment finding . . . on an expedited basis,” as XO proposes in the alternative.<sup>3</sup> SBC and others have submitted overwhelming evidence that requesting carriers are not impaired on a nationwide basis without access to high capacity loops (including DS1 loops) because widespread deployment of competitive transmission facilities and the availability of alternatives, like ILEC special access. The Commission cannot just sweep that evidence aside and mandate nationwide unbundling of DS1 loops based on XO’s recycled claims of impairment.

In addition to being unlawful, XO’s request that the Commission issue an expedited impairment finding without considering the considerable record developed in the above-referenced proceeding is unnecessary. The Commission has made clear that it will establish new, permanent unbundling rules that are consistent with the requirements of the Act and the *USTA II* decision in less than three months. In light of the Commission’s already expedited consideration of new unbundling rules, there is no justification for the precipitous action XO seeks. Accordingly, XO’s petition should be denied.

If you have any questions concerning the foregoing, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Marlene H. Dortch", with a long horizontal flourish extending to the right.

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<sup>3</sup> *Emergency Petition* at 23- 37.